



Confidentiality, libel, peer review and the law

by Elaine Heywood

There are several myths in the science, technical and medical journal publishing world surrounding confidentiality and libel. Do editors hide behind the risk of being sued for libel or breaching confidentiality as reason not to police unethical behaviour or suspected misconduct of authors or peer reviewers? The Committee on Publication Ethics often cite confidentiality concerns as a key issue. Do the risks undermine the integrity of journal publications and even of evidence-based science itself? This article considers the legal position and some of the legal issues that editors face in relation to questions of confidentiality and libel under English law.

Confidentiality

The Prince of Wales, Max Mosley and JK Rowling's young son have all been embroiled recently in cases on the law of confidentiality. However, the issue of confidentiality is not just restricted to public figures or celebrities. Confidentiality is key to the peer review process (unless of course it is an open peer review). A duty of confidence arises when confidential information comes to the knowledge of a person where he/she knows or agrees that the information concerned is confidential, and as a result, should not be disclosed to third parties. The duty may be express or implied. The journal's guidelines to authors and reviewers will be crucial in determining the scope of the duty.

If a journal's policy is that author/editor correspondence is confidential and the journal will not disclose information about manuscripts or peer reviews without an author's or reviewer's permission, an obligation of confidence arises. If the journal breaches this, the author or the reviewer may have a claim for damages for breach of confidence on the basis that he/she submitted material to the journal on the basis that the information would be treated as confidential and it was not. This is the case even if there is suspected misconduct, unless the journal in its guidelines to authors, specifically reserves the right to break confidentiality and pass information to third parties without the author's permission, if misconduct is suspected, or there is a public interest in disclosure.

Confidentiality is necessary to preserve the independence, quality and integrity of the journal and its peer review process. As such, the author will generally not know the identity of his/her reviewers (save in open peer review). However, confidentiality is not always certain. An author might request sight of a hostile review under data protec-

tion legislation, which could then in turn lead to disclosure (see below). A reviewer may breach confidentiality by leaking a damaging report about a drug to a manufacturer. An action for breach of confidence would lie against the reviewer but the reviewer may argue public interest. In both cases, the journal's reputation may be affected.

What about confidentiality of emails? Emails are no different to ordinary correspondence. If there is an obligation of confidence, that obligation will be breached if an email or an email chain is disclosed to a third party. This is a risk in forwarding emails and email chains particularly concerning issues of suspected misconduct and editors should be alive to this, especially avoiding the 'Reply to All' button. If a reviewer makes an allegation of misconduct against an author in an email to an editor and the editor forwards this on to a third party, not only will confidentiality be breached but it is conceivable that an unfortunate editor or journal may end up facing a libel claim from the author for publishing the email to another person. Blake Laphorn has had to advise on several such threats in recent years, often from aggrieved authors in the US or their institutions.

Another issue that needs to be borne in mind is the data protection legislation in Europe, which derives from the European Directive on Data Protection. For example, under UK legislation, the Data Protection Act 1998, a person is entitled to request their personal data under a 'subject access' request. This can prove problematic for journals as authors could request most information that the journal or editor holds about them, including potentially 'confidential' reviews. Clearly if an author receives a hostile review, he/she is likely to ask to see it.

The Data Protection Act 1998 does however, provide protection to certain classes of confidential information and it is possible that, if journals have a clear and effective data protection policy and provide the right guidance to authors, editors and reviewers, they may be entitled to rely on the confidentiality of the peer review process. In addition, there is an argument that has been tested in the English courts, but not at a European level, that some kinds of information are not 'personal data' as interpreted by data protection legislation, even if they name an individual, but are statements of information about a factual nexus and so the author is not entitled to see the data.

The principal case on this in the UK involves a bank investigation, where the subject of the case was refused permis-

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>>> Confidentiality, libel, peer review and the law

sion to see the correspondence about a complaint which was subsequently investigated, on the grounds that the correspondence was not about the individual but about the individual's complaint. This seems rather a thin distinction, although it does represent the current state of English law. The problem journals face is that a refusal to comply with a subject access request can lead to a time-consuming and costly case before the Information Commissioner, and so it is important to act promptly when faced with a subject access request. One option is to ask for a £10 cheque prior to investigating the request, as all holders of information are entitled to require this as a precondition to providing the information, not least to deter nuisance, and this is useful if you suspect the complaint is not in good faith. Our experience, however, is that a large number of requests disappear when a cheque is requested.

Ultimately, confidentiality can be overridden by order of the court and so, if a third party seeks disclosure of confidential documents to be used in litigation, a court may nevertheless order disclosure of such documents. This is common in the US where documents are subpoenaed for use in litigation.

If confidentiality is breached, or disclosure is permitted under data protection rules or by order of the court, the danger faced by the journal is a potential libel claim. Confidentiality does not displace a person's right not to have their reputation damaged.

Say what you mean

Primary objective: to compare efficacy in terms of overall survival time in subjects with advanced cancer receiving chemo1/chemo2 plus mab1 compared with subjects receiving the same chemotherapy alone.

The dreaded slash again: what is being compared here? One group treated with *chemo1* combined with *chemo2* combined with *mab1* and another treated with *chemo1* combined with *chemo2*, or 2 groups treated with *chemo1* combined with *mab1* or *chemo2* combined with *mab1* compared with *chemo1* alone or *chemo2* alone—or even ? Whew! This is the mess this slash gets you into.

Think about it: *to compare efficacy in terms of overall survival time in subjects with advanced cancer receiving combined treatment with chemo1 and chemo2 with and without mab1.*

That was what was meant.

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Libel

Libel is defamation in permanent form—an article, review, correspondence or an email—through publication (communication) of a defamatory statement to a third party. A statement is defamatory if it lowers someone's reputation or makes one think worse of a person or a company. An allegation of plagiarism, misconduct, unethical or merely dubious conduct is clearly defamatory. It does not matter that the libel was unintentional or not what was meant or not meant to be seen. What matters is how an ordinary and reasonable person would interpret it. The author, editor and publisher of the defamatory allegation can be sued.

The onus is then on the editor/publisher of the journal to prove the truth of the allegation. Truth, however, is hard to prove, particularly in the absence of clearly documented evidence and defending a libel claim will be expensive and potentially damaging to a journal's reputation.

There are two other important defences which frequently apply—fair comment (statements of opinion as opposed to fact in the public interest) and qualified privilege (a duty to publish information to a third party who has a reciprocal interest in receiving it or a public interest in publishing fairly). However, both these defences are defeated if the author for example, can show malice, which is not outside the realms of possibility in the world of academic rivalry. Malice in the case of qualified privilege means a dominant improper motive for publishing a statement, whereas in the case of fair comment, it has the narrower meaning of absence of an honest belief in the truth of a statement or reckless indifference as to the truth. However, malice is generally very difficult to prove and the burden of proof is on the complainant, which is some comfort to editors.

Note that publication is essential or there is no libel. If an allegation is put directly to an author without wider circulation, there is likely to be no publication. However, even a confidential letter to a reviewer asking for comment on whether an allegation is true or false may amount to publication if the author learns about it. Editors, therefore, need to exercise particular caution when dealing with allegations of unethical behaviour or suspected misconduct.

As can be seen above, under a subject access request, authors are able to request personal data about themselves, including for example, a damaging peer review or correspondence about an allegation of plagiarism which would be libellous of the author. If the author's career and reputation is on the line, he is likely to sue unless the allegation can be clearly proved as true by the publisher.

This presents a dilemma for journals as it is important to safeguard the confidentiality of the peer review process, but it is difficult to guarantee that damaging statements will not leak out.

Jurisdiction

What happens in the case of an international journal that has an editorial office in the UK with authors in Europe or an editorial office in the US but an author in the UK?

For breach of confidence, in the absence of an express contractual agreement as to which law applies, the general rule under English law would be that the country where the obligation of confidence was breached would be the country in which to sue. However, under an agreement called Rome II, which applies to EU member states, from January 2009 the applicable law would be the country where the damage occurred. In most cases this is likely to be the place where the duty applies. So, if the journal is a UK journal and the author is French, the applicable law is likely to be English law.

In terms of data protection, jurisdiction depends on who the data controller is and where the data is held.

For libel, an author can bring a libel claim in any country where publication has taken place or defamatory content has been downloaded and where he/she has a reputation to protect. Most authors will want to sue in England because the libel laws are known to be claimant friendly. The position is of course, very different in the US with the emphasis on freedom of expression as opposed to protecting reputation.

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Conclusion

Whilst confidentiality is the bedrock to both author/editor correspondence and the peer review process, it cannot be guaranteed. A journal's policy may allow disclosure of serious misconduct to third parties. Further, in certain circumstances, confidential correspondence and reviews may be disclosable under data protection legislation, which may lead to a libel claim. Editors, therefore, are right to be cautious about confidentiality and the risks that it brings. However, there are some practical ways for journals and their editors to manage the risks of claims for breach of confidence or libel, such as:

- to have clear guidance notes for editors, authors and reviewers on the journal's policy on confidentiality;
- to have clear guidance for editors on handling hostile reviews and allegations of misconduct;
- to have a libel policy;
- to provide clear guidance for reviewers on avoiding making libellous or personal comments in reviews;
- to have an email policy; and
- to have an effective data protection policy.

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I have seen the future and it works

You can always rely on older members of trades and professions to lament the decline in standards since 'their day'. A senior cardiologist bemoans the fact that newly qualified doctors know nothing of medicine. Marketing and advertising veterans complain that brand managers lack initiative and imagination and are wedded to researching every proposition to the point where creativity dies.

As a retired medical writer, I'm no different. OK so I have finally given up my war on the passive voice. I've also given in to writers—doctors and medical writers—who love to use long technical terms when short words in plain English would convey the meaning more clearly. In short, I have wearily surrendered to the kind of writers who will never use three or four words when a couple of thousand will easily do¹.

I remain pedantic, grumpy and—as I have been called once this week—a cranky pants. But do I despair for the future?

Not now I don't, because I have just read in *New Scientist* a beautifully crafted, witty and interesting piece and it comes from a student. First prize in the 2008 Wellcome Trust and *New Scientist* essay competition went to Katherine Robertson, a medical student currently doing a PhD at the University of Cambridge.

Her essay, 'Fusion cuisine: the many talents of the placenta', shows how the laboratory work of scientists ties in with the everyday work of an obstetrician.

The Wellcome Trust quotes Katherine as saying: "I was very excited to win this competition because I think the placenta is often overlooked in favour of more exotic research topics like the brain, but it is every bit as crucial".

"I hope to practise as an obstetrician in the future but winning this competition has also made me think about how I could combine that with writing, maybe for a more general audience".

She wins £1000, a two-week, expenses-paid media placement with *New Scientist* and publication of her essay in the magazine. An EMWA member in the future? I hope so. If only she hadn't slipped into the passive voice once or twice.

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Read Katherine Robertson's winning essay at:
http://www.wellcome.ac.uk/stellent/groups/corporatesite/@msh_peda/documents/web_document/WTX050707.doc

¹ A quotation from the Jake Thackray song On Again